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Supreme Court, U.S.
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No. 96-2000

In The

Supreme Court of the United States

October Term, 1996

MGM GRAND AIR, INC.,

Petitioner,

v.

MARK MICELI, ANDREA MICELI,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District, Division Four

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

The Petition accurately states the parties to this proceeding.

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INTRODUCTION

No decision, textual or historical evidence supports the claim that a charter agreement for an international flight is a passenger ticket for purposes of the Warsaw Convention (or for any other purpose), and there is no rationale under which such a proposition can be reconciled with the Convention's objective of securing both uniform documentary practices and delivery of documentation to passengers.

The facts before the lower courts established that MGM Grand Air made no effort to issue tickets to passengers on an international charter flight, and made no effort to identify and "accept" the passengers in question, despite the fact that this is an essential function of a "carrier" for purposes of the Warsaw Convention. After plaintiff Mark Miceli was injured on one leg of the flight, MGM Grand Air attempted to invoke the liability limitations of the Warsaw Convention, notwithstanding its failure to issue or deliver tickets to passengers, arguing that a charter agreement with a company organizing the flight somehow constitutes a "ticket", and that once the charter agreement is made, the aircraft operator has no responsibility to ticket, identify or accept passengers. Under this argument, the requirement that a carrier not accept a passenger without a passenger ticket having been delivered is written out of Article 3 of the Convention for any charter flight.

Petitioner asks this Court to rescue it from its failure to make the most minimal effort to satisfy the ticketing requirements by announcing a new rule which is contrary to airline practice and unsupported by the plain language of the Convention or by any decisional authority. All authority regarding the definition and use of a "ticket" is to the

contrary, and the history of the Convention indicates that a charter operator which eschews it duty to ticket and accept passengers is not a "carrier" under the Convention and cannot invoke its protections.

Moreover, the issues posed by the Petition are moot in view of the fact that, regardless of how the charter agreement is characterized, there was no attempt to deliver it to passengers, an essential precondition to invoking liability limitations under Article 3(2) of the Convention.

STATEMENT OF THE CASE

MGM Grand Air, an air charter operator, entered into a charter agreement with Music Guide, Inc. to provide transportation for the cast and crew of Madonna's "Girly Show" world tour. Mark Miceli was video director for the tour pursuant to his contract with another entity, Music Tour, Inc. He had no relationship with Music Guide and no knowledge of the charter agreement with MGM Grand Air.

The flight originated in Los Angeles and was scheduled to make a number of stops outside the United States. Prior to departure, neither Miceli nor any other passenger was provided with a ticket, baggage check, or any notices or documentation required by the Warsaw Convention as a condition to limiting liability. MGM Grand Air left selection and acceptance of passengers to Music Guild.

During a leg between Puerto Rico and Argentina, the crew flew the plane into an area of known high turbulence. The plane was abruptly tossed about, resulting in serious personal injuries to plaintiff.

REASONS TO DENY THE WRIT

A.
THE WARSAW CONVENTION EXPRESSLY DISTINGUISHES THE PASSENGER TICKET FROM THE CONTRACT OF CARRIAGE

The Petition asserts that the Court of Appeal improperly "implied" a format provision in Article 3 of the Convention, and that the charter agreement was a ticket because it complied with the Warsaw "definition" of a passenger ticket. This is incorrect in several respects.

First, the Warsaw Convention does not define the term "ticket" but rather uses it in its ordinary sense. It specifies certain information which the ticket is required to include in Article 3, subsection 1, but these "particulars" are additional requirements, not definitional criteria for the term "passenger ticket". It has been accepted in practice, by commentators, and by the decisional law that "ticket" in the Convention carries the same functional sense as it does in ordinary practice and usage; i.e. a token of the passenger's right to carriage, to be surrendered upon boarding when the passenger is accepted for carriage.[1] The decisional law makes it clear that a passenger ticket is different from a charter agreement, and that the Warsaw Convention employs the terms "passenger ticket" and "contract" in entirely

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[1] It is well accepted that the relationship with the carrier is created and the passenger is accepted by the carrier when the latter surrenders the passenger ticket on boarding. 13 Corpus Juris Secundum "Carriers" §499(b), page 466; Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal.App.4th 1506, 1510, 3 Cal.Rptr.2d 897.

disjoint senses. Block v. Compagnie Nationale Air France (5th Cir. 1967) 386 F.2d 323, 332; P.T. Airfast Service of Indonesia v. Superior Court (1983) 139 Cal.App.3d 162, 188 Cal.Rptr. 628.

The most authoritative decision, Block, *supra*, 386 F.2d 323, explained after examining the drafting history of the Convention that the charter agreement is irrelevant for Warsaw purposes; the critical event is "the relationship between the individual passengers and Air France, **concluded by the airline's delivery to each passenger of a personal ticket** for the flight." [*Id.* at 335] Block recognized that the ticket is not a contract but a transportation document, distinct from any contract of carriage between the carrier and passenger or charterer. Referring to the role the contract plays in the Warsaw scheme, the court observed:

> This rationale - that the flight arrangements must be based upon an agreement because only in that way can the necessary knowledge or foreseeability be achieved - implies that as long as there exists an agreement between the carrier and passenger as to transportation and as to places of departure and arrival, **any agreement between the owner carrier and a third person, the charterer, is irrelevant to Warsaw purposes.**"
> [*Id.* at 334, emphasis added]

Goldhirsch, The Warsaw Convention Annotated (Martinus Nijhoff, 1988) 21, notes that the term "ticket" carries the accepted sense of "the printed paper, usually a booklet, which evidences the contract of carriage between the carrier and the passenger. It is not the contract . . ."

The notion that the charter agreement is some sort of a "group ticket" would vitiate the carrier's responsibility to enter into a relationship with the passenger, not just some third party, and to **accept that passenger** prior to carriage and after a ticket has been delivered to and surrendered by the passenger. A charter agreement is not a ticket for purposes of the Convention since it is obviously not intended to be delivered to the passenger, nor does it indicate in any way the passenger's right to carriage. The distinction is overt in Article 3(2):

> The absence, irregularity or loss of the **passenger ticket** shall not affect the existence or the validity of the **contract of transportation**, which shall nonetheless be subject to the rules of this Convention. Nevertheless, **if the carrier accepts a passenger without a passenger ticket having been delivered**, he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.
> [emphasis added]

Contrary to MGM Grand's assertion, the instant charter agreement does not contain the "particulars" required by the Convention. Article 3 requires that the "carrier must deliver a passenger ticket which shall contain the following particulars: (a) the place and date of issue; (b) the place of departure and of destination; (c) the agreed stopping places provided that the carrier may reserve the right to alter the stopping places in case of necessity. . . "

The charter agreement contains no "place and date of

issue", since it was never issued. Nor does it indicate the place of departure and destination of the passenger. What it contains, rather, is an itinerary **for the aircraft**, not an itinerary for an individual passenger. Passengers might board or terminate their journey at any number of places. It is impossible to tell from the charter agreement where any individual passenger begins or ends his or her journey.

In fact, every reported charter case under the Warsaw Convention has involved tickets issued to and in the name of the individual passenger, demonstrating that charter operators are aware of and accept the need for the issuance of a ticket as it is generally understood, and not simply the making of a charter agreement. See Block, *supra*, P.T. Airfast, *supra*, Mertens v. Flying Tiger Lines, Inc. (2nd Cir. 1965) 341 F.2d 851, Warren v. Flying Tiger Lines, Inc. (2nd Cir. 1965) 352 F.2d 494, In re Air Crash Disaster at Warsaw, Poland (2nd Cir. 1984) 748 F.2d 94.

The Petition suggests at pages 13-14 that the plain language of Article 3 requiring "delivery" of a "passenger ticket" should be abrogated by this Court because some carriers have in certain circumstances eliminated paper documentation in favor of electronic means. Having invited this Court to re-write the Convention to eliminate the documentary requirements which lie at the heart of Article 3, Petitioner then accuses the Court of Appeal of violating the rules of treaty construction! Needless to say, Petitioner advocates a dramatic treaty revision without the slightest evidence that it would ever have been within contemplation of the drafters of the Convention.

The rule that words and phrases used in an enactment are presumed to have a meaning and to perform a useful

function, and that they are to be given their common and ordinary meaning, applies to the interpretation of international agreements. "In construing a treaty, the terms thereof are given their ordinary meaning in the context of the treaty, and are interpreted, in accordance with that meaning, in the way that best fulfills the purposes of the treaty." Xerox Corp. v. United States (Fed.Cir. 1994) 41 F.3d 647, 652. It is inconceivable that an international treaty could be altered by the decision of private parties to dispense with its express requisites.

B.
CHAN v. KOREAN AIRLINES PROVIDES NO SUPPORT FOR THE PROPOSITION THAT A CHARTER AGREEMENT SATISFIES THE TICKETING REQUIREMENT OF ARTICLE 3

Petitioner suggests that under Chan v. Korean Airlines (1989) 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113, any piece of paper that happens to contain information similar to a ticket will satisfy Article 3 so long as it is placed in the hands of some entity arranging the flight. In doing so, Petitioner distorts the holding of the case and ignores the purpose of Article 3 of the Convention.

MGM asserts that Chan states that any document would qualify as a passenger ticket under Article 3 unless it was a blank form with no information on it. (Petition, page 10) Chan does not even remotely so hold, and had no occasion to define the term "ticket" since there was a ticket delivered in that case. In fact, the language cited by MGM indicates that "passenger ticket" is a document distinct from the contract of transportation (as Block and other cases hold). Chan holds that the failure of a passenger ticket to contain all

the Article 3 particulars does not mean it is not a passenger ticket and does not, under the language of the Convention, result in loss of liability limitations. But the term "ticket" is used by the Court as having a particular meaning, whereas under Petitioner's interpretation, the term becomes superfluous and devoid of its ordinary sense.

It is well accepted that the objectives of the Warsaw Convention were to (1) secure uniformity in documentary practices; (2) limit airline liability for international flights and (3) afford adequate notice of such limitations to passengers and shippers. Block, *supra*, 386 F.2d at 327. Chan does not disagree with these objectives.

In Chan, a passenger ticket was issued to the individual passenger in accordance with accepted international practice. The issue before the Court was the penalty for failing to give notice of the Warsaw liability limitations in adequate size. The Court had no occasion to deal with the term "ticket" since there was indisputably a ticket issued to the passenger. The Court determined that the adequacy of the warning in terms of type size was not a condition of invoking the Warsaw liability limitations, based largely on the fact that the language of Article 3 differed from that of Articles dealing with limitations on damages for lost freight and baggage. The Court's interpretation was based upon the fact that the only sanction in Article 3 appears in the second clause of Article 3(2) which subjects a carrier to unlimited liability if it "accepts a passenger without a passenger ticket having been delivered". Thus, "delivery" of a ticket does not imply a ticket providing all of the information required by Article 3. Instead, loss of liability occurs in the case of a "carrier's failure to deliver any document whatever, or its delivery of a document with shortcomings was so extensive

that it cannot reasonably be described as a ticket. For example, a mistakenly delivered blank form, with no data filled in." (490 U.S. 128-129) In this case, of course, no document whatever was delivered.

The majority and concurring opinions in Chan both use the term "ticket" as having a meaning separate and independent of the "particulars" listed in Article 3. As the lead Opinion notes, "delivery of a defective document is something quite different from failure to deliver a document." (490 U.S. 132) Justice Scalia indicates in the lead Opinion that there is a difference between a passenger ticket and a passenger ticket in full compliance with Article 3. He rejects the argument that "passenger ticket" as used in Article 3(2) is shorthand for a document "consisting of all the requirements that Article 3(1) says a passenger ticket must contain". (490 U.S. 129 fn.3) The concurring Opinion of four Justices, written by Justice Brennan, cites the early drafts of the Convention which withdrew liability if the "carrier accepts a passenger without a passenger ticket having been made out, or if the ticket does not contain the above-mentioned particulars . . ." (490 U.S. 141) Thus, neither the lead nor the concurring Opinion in Chan furnishes support to MGM's argument, and the plain language and drafting history of the Convention demonstrate that "ticket" is used with its usual meaning, as reflected in custom and practice.

As the Court of Appeal aptly noted in the instant case, no one could reasonably expect the charter agreement to function as a ticket. Any number of individuals must show up at the plane with copies of the charter agreement yet have absolutely no right to board. Indeed, no person has a right to board unless and until a ticket has been issued to and surrendered by the passenger; this is the function of the ticket.

C.
THE OPINION OF THE COURT OF APPEAL DOES NOT CONFLICT WITH CHAN

MGM Grand's contention that the Opinion in this case resurrects the doctrine that lack of adequate notice of liability limitations removes Warsaw liability limitations - a rule supposedly disapproved by Chan - is baseless.

The requirement of the Convention at issue here is not that of notice of the Warsaw liability limitations, but (1) **issuance** and (2) **delivery** of a (3) **ticket** (4) **to the passenger** (5) prior to **acceptance** of the passenger by the carrier. Not one of these five conditions was met in the instant case, and thus one never reaches the issue of notice of liability limitations.

The contention that Chan disapproved of certain earlier decisions which held that adequate notice of the liability limitations is a prerequisite to the protections of Article 3, and thereby disapproved of the reasoning of Block v. Air France, is untenable. While Chan disapproved of an interpretation of Article 3 which implied that adequate notice of the passenger liability limitations was an implicit prerequisite of any limitation on liability, the reason the Court did so was because the explicit and clear language of Article 3 called only for **delivery** of a passenger ticket to the passenger prior to acceptance for carriage. It is this clear and unambiguous language which governs the instant case. Chan is thus inconsistent with Petitioner's contention that delivery of a ticket to the passenger is not a pre-condition of the liability limitation. Chan is entirely consistent with and reinforces the discussion in Block of the function and necessity of the ticket, and the irrelevance of the charter

agreement to the application of Warsaw liability limitations. Block sets forth the drafting history of the Convention as well as authorities demonstrating that a "passenger ticket" is a document separate from a charter contract. There is no conflict with Chan, which does not cite Block, much less disapprove it.

D.
THE ARGUMENTS IN THE PETITION ARE MOOT AS THERE WAS NO "DELIVERY" TO PLAINTIFF

Petitioner's arguments concerning the term "ticket" and its efforts to read that term out of the Convention and replace it with a broad concept incorporating any document with a travel itinerary and the carrier's name, are moot in light of the undisputed fact that there was no effort (or apparent intent) to deliver the charter agreement to Miceli or other passengers. It was undisputed that Miceli had no relationship with the organization which chartered the flight and no knowledge of the charter agreement.

There is no authority under which the "delivery" requirement of Article 3 can be met where there is not the slightest effort to deliver any document to the passenger, either directly or constructively, much less a document which might reasonably be construed as a passenger ticket.

Just as MGM would read the term "ticket" out of the Convention, so it would drain the delivery requirement of any meaning to prevail in this action. But the notion of delivery, like that of ticket, has a crucial function in both the Warsaw Convention scheme and transportation generally; it signifies the carrier's acceptance of that passenger for carriage, establishing the relationship between passenger and

carrier. Block, *supra*, 386 F.2d 334-336. In every case in which the Warsaw liability limitations were upheld, this function was achieved by delivery which in some manner allowed the passenger at least the opportunity to inspect the ticket and the carrier to accept or reject that individual passenger. The notion of delivery is functionally linked to that of the passenger ticket. Delivery in essence means that a ticket is provided in a manner that allows it to perform the function of notification and acceptance. MGM cannot under the facts of this case meet that requirement.

E.
THE ARGUMENTS IN THE PETITION ARE MOOT SINCE PETITIONER IS NOT A "CARRIER" WITHIN THE MEANING OF THE CONVENTION

The charter contract with Music Guide provided the latter with the responsibility for determining who would be transported on the aircraft and for giving notice of baggage loss limitations.[2] Petitioner had no apparent role in accepting individuals for carriage. The consequences of this is that MGM Grand is not a carrier entitled to liability limitations under the Convention, but simply an aircraft operator.

Liability limitations contained in the Convention

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[2] While the charter agreement required Music Guide to inform passengers of the Warsaw baggage liability limitations, it did not obligate Music Guide to advise passengers of limitations on personal injury damages. In any event, responsibility for issuing tickets and baggage checks and giving notice of liability limitations is placed on the carrier by Articles 3 and 4 of the Convention.

benefit only "carriers". See Articles 17-30; In Re Paris Air Crash (D.C.Cal. 1975) 399 F.Supp. 732; In re Air Crash Disaster at Warsaw, Poland (2d Cir. 1984) 748 F.2d 94. In essence, MGM attempted to shift to the charterer the responsibility for delivery of tickets, selection of passengers and compliance with Warsaw documentary requirements.[3] If Music Guide is the issuer of tickets and baggage checks, then it is also the carrier, and MGM is entitled to no protection under the Warsaw Convention.

Block noted that the principal commentators on the Warsaw Convention had concluded that in a charter situation where the charterer assumes ticketing or other Warsaw Convention functions for the flight, the charterer and **not the lessor or operator** of the aircraft may be considered the carrier. (386 F.2d 348-351) Thus, one commentator "concluded that the owner of an airplane should be considered the carrier with respect to the charterer, because he binds himself to perform the transportation for the account of the charterer; **the charterer would be the carrier with respect to the passengers**. The Warsaw Convention would then apply to the charterer-passenger relationship, but not to the owner-charterer relationship" in the situation where the charterer issues tickets and other necessary traffic documents. 386 F.2d 349, citing Goedhuis, Les Contrats de charte et de louage des aeronefs en connexion avec la Convention de Varsovie, 59 RDILC 687-702 and National Air Legislation

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[3] A carrier has discretion in accepting passengers even after entering into a charter agreement. Block, *supra*, 386 F.2d at 336, Cordel v. Cia. Mexicana De Aviasione SA (9th Cir. 1982) 681 F.2d 669. A carrier may reject even a ticket holder for good cause. 49 U.S.C. §1374(b), §1511(a), Ames v. Southern Pacific Co. (1904) 141 Cal. 728, 75 P. 310, 311.

and the Warsaw Convention (The Hague 1937) 131-136.

Another commentator states that "When the functions of a Warsaw carrier are divided, the party exercising the most important function has the status of carrier. 'If the aircraft owner would in any case really have no practical possibility of issuing transportation documents, the Convention can no longer apply.'" (395 F.2d 350-351, citing Gronfors, Air Charter and Warsaw Convention [Stockholm 1956] 91) In this view, "the possibility to issue transportation documents is the most important function in view of the severe penalties attached to non-compliance." (386 F.2d 350-351 fn. 62)

Block concluded that Air France was a carrier because it not only assumed contractual responsibility for transport of passengers and controlled the aircraft, but because

> A passenger's right to be carried came into being only on the issuance and delivery of an individual ticket by Air France showing on its face the airline's obligation to perform the contract of transportation under the provisions of the Warsaw Convention.
> [*Id.* at 353]

MGM Grand is not a carrier within the meaning of the Convention, for by its own admission it attempted to shed itself of the most essential carrier functions under the Convention: the issuance of passenger tickets and other travel documentation, and the acceptance of passengers.

CONCLUSION

Ordinary language, unanimous precedent and the history of the Warsaw Convention all indicate that the term "passenger ticket" refers to documentation customarily issued by carriers to passengers, signifying that individual's right to passage, and the surrender of which signifies the carrier's acceptance of the individual for passage.

Petitioner's interpretation of Chan rewrites the Convention by eliminating the provision removing liability limitations "if the carrier accepts a passenger without a passenger ticket having been delivered." This provision, like the term "passenger ticket" and the delivery requirement, become meaningless under MGM Grand's construction of Article 3, since there is no way of distinguishing who the carrier "accepts" or to whom it has "delivered" a ticket.

Respondents therefore submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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